

IN THE

AUG 27 2014

Supreme Court of the United States

CLERK OF THE CLERK

VANDROTH BACKUS, WILLIE HARRISON BROWN,
CHARLESANN BUTTONE, BOOKER MANIGAULT,
EDWARD MCKNIGHT, MOSES MIMS, JR.,
ROOSEVELT WALLACE, and WILLIAM G. WILDER,
on behalf of themselves and all other
similarly situated persons,

Appellants,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY,
in her capacity as Governor, JOHN E. COURSON, in his
capacity as President Pro Tempore of the Senate,
ROBERT W. HARRELL, JR., in his capacity as Speaker
of the House of Representatives; MARCI ANDINO, in
her capacity as Executive Director of the Election
Commission, JOHN H. HUDGENS, III, Chairman,
NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON,
and THOMAS WARING, in their capacity as
Commissioners of the Election Commission,

Appellees.

**On Appeal from a Three-Judge
United States District Court
in the District of South Carolina**

APPELLANTS' REPLY BRIEF

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August 27, 2014

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APPELLANTS' REPLY BRIEF

Appellants' seek review of the three-judge district court's refusal to vacate its order denying injunctive relief and approving an express racial quota used to design election districts for the South Carolina House of Representatives. Appellees moved to dismiss or affirm arguing this Court lacks jurisdiction to review a post-judgment order of the three-judge court unconcerned by its reliance on an unconstitutional act or that *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013) has any impact on the constitutional scrutiny applied to equal protection claims in redistricting cases.

Appellees' motion misapprehends the controlling jurisdictional provisions that expressly vest this Court with appellate review of the three-judge court's order. The Court should also reject Appellees' arguments concerning the merits as they turn exclusively on the *ipse dixit* assertion that *Shelby County* fails to disturb the predominant-factor doctrine applied by the district court before and after *Shelby County*.

I. *Shelby County* vitiates the reasoning supporting the judgment in *Backus I*.

Appellees do not contest, nor can they, the State's admitted use of race as evidenced by its efforts to obtain administrative preclearance and justify its conduct at trial. *See, e.g.*, J.S. at 14-18. The record below is replete with admissions that § 5 *required* the creation of 30 majority-black House districts—an unprecedented racial districting unsupported by any contemporaneous evidence and unwarranted in light of the considerable success black candidates were enjoying among bi-racial constituencies. *See, e.g.*, J.S. at 8-14. Instead, Appellees advance two merits

arguments, each largely unexplained and wholly unsupported.

First, Appellees argue the issues presented are not properly before the Court. *See* Mot., 14-15. Appellees contend this appeal to review the denial of a motion for post-judgment relief, “presents a substantive argument regarding the merits of the judgment entered over two years ago.” Mot., 14. Appellees are mistaken because the question here is whether the district court erred by denying post-judgment relief seeking to disallow the State’s reliance on § 5 when upholding Act 72 of 2011. *Shelby County* was the predicate for this relief which could not have been litigated in *Backus v. South Carolina*, 857 F. Supp. 2d 553, 558 (D.S.C. 2012) *aff’d*, 133 S. Ct. 156 (2012), because that decision was not handed down until eight months *after Backus I*.

Backus I clearly turned on whether racial considerations *predominated* over all other districting principles and thus violated the Fourteenth Amendment for the reasons explained in the *Shaw* cases. *See Backus*, 857 F. Supp. 2d at 559 (“If a plaintiff establishes that the legislature used race as the predominant factor in redistricting, the redistricting scheme will be subject to strict scrutiny.”). The district court found the legislature’s use of race permissible for a covered jurisdiction so long as it “did not overly rely on race in a manner that runs afoul of the Fourteenth Amendment.” *Id.* at 565. Appellees contend this appeal seeks to re-litigate the district court’s decision § 5 justified racial action. To the contrary, Appellants embrace that judgment as the basis for relief here because the district court’s § 5 justification is rendered untenable by *Shelby County*. Appellees’ suggestion that Appellants’ post-judgment

relief petition is a “substitute for appeal[,]” *see* Mot. 14-15, evasively fails to engage the substantive arguments presented and should be rejected.

Second, Appellees argue Rule 60(b) relief is unwarranted. *See* Mot. 16-22. These arguments turn almost exclusively on the unsupported assertion that *Shelby County* failed to disturb the predominant-factor doctrine, and the more troubling assertion that, even if it did, the State’s recent racial gerrymander should be left intact because “the underlying judgment has become final and there are no extraordinary circumstances to justify [relief].” Mot., 19-22. These arguments are without explanation or citation and should be rejected.¹

Last term, this Court weighed an exercise of constitutional power by Michigan voters seeking to bar race-based decision making by public institutions of higher education. *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014). In holding that Michigan voters were entitled to ban racial admissions policies, the Court rejected the paternalistic notion that constitutional progress toward greater fairness and the equal dignity of all persons was work beyond the public’s

¹ Appellees challenge Appellants’ reliance on *Horne v. Flores*, 557 U.S. 433 (2009), arguing it is confined to a district court’s refusal to modify an existing injunction, not the failure to grant one. *See* Mot., 17-18. This too misses the point. *Horne* requires a flexible approach to post-judgment relief because the standard for relief is not intended to be insurmountable and requires district courts to consider the inherent risk in allowing federal decrees to govern policy choices typically left to ordinary politics. *See id.* at 450-52. These concerns apply equally to Rule 60(b)(6) motions as to subsection (b)(5) motions like the one at issue in *Horne*.

capacity. *See id.* at 1637. Without disclaiming a role for searching judicial review, this Court was unwilling to second guess the People’s decision that the government not employ a racial preference on account of its “latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.” *Id.* at 1638.

This aspirational component of our constitutional obligations has been a longstanding fixture in the Court’s redistricting precedent. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657-58 (1993), *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003). It is equally present in *Shelby County* where this Court’s analysis *credited* the Voting Rights Act with redressing discrimination and integrating the voting process. *See Shelby Cnty.*, 133 S. Ct. at 2618-19 & 2630-31. Congress’s decision to reauthorize this extraordinary remedy in a more onerous fashion was constitutionally suspect because it failed to recognize dramatic social change for the better. *See id.* at 2625-26. Appellees’ assertions post-judgment relief is unwarranted mistakenly assume this Court intended no consequence to its decision in *Shelby County*.

Appellees argue the demise of § 5 fails to displace the predominant-factor doctrine’s permissive use of race such that legislatures can *always* include and exclude voters from election districts on account of race. *See Mot.*, 19-21. This conclusion is flawed because strict scrutiny analysis is not context specific such that the burden to demonstrate a compelling interest achieved through narrow tailoring varies depending on subject matter. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2421 (2013). Such a rule would make strict scrutiny “strict in theory but feeble

in fact.” *Id.* at 2421. This assertion is also troubling as this Court has long expressed concern that remedial action could harm democratic institutions by perpetuating racial differences rather than mending them. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Appellees, elected representatives and beneficiaries of the racial balkanization they seek to maintain, assert an entitlement to racial districting in the absence of *any* Voting Rights Act mandate and urge this Court to ossify South Carolina politics in a bygone era. This cynical argument should be rejected. “The idea of democracy is that it can, and must, mature[,]” *Schuette*, 134 S. Ct. at 1637, “[a]nd those who govern should be the *last* people to help decide who *should* govern.” *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441-42 (2014) (emphasis original). The district court failed to give adequate consideration to the transformative nature of *Shelby County*. Had it done so, it would have withdrawn its judgment denying injunctive relief.

II. Appellees misapprehend the scope of appellate review in this reapportionment case.

Section 1253 of the Judicial Code vests appellate jurisdiction in the Supreme Court over an order granting or denying injunctive relief in any civil action “required by any Act of Congress to be heard and determined by a district court of three judges.” 28 U.S.C. § 1253. The court below was empaneled pursuant to 28 U.S.C. § 2284(a), which requires a three-judge court “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” Appellees construe this

jurisdictional scheme to preclude review of orders denying post-judgment relief. This conclusion is inconsistent with the statutory scheme and unsupported by precedent of construing jurisdiction to reach substantial constitutional questions.

A. Appellate jurisdiction over three-judge court decisions in statewide redistricting cases includes post-judgment relief.

There is no dispute this Court had jurisdiction over *Backus I* or that an order denying post-judgment relief is a final order from which appeal can be taken. *See* Mot., 12 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005); *Reid v. Angelone*, 369 U.S. 363, 368 (4th Cir. 2004)). The sole question raised by Appellees is whether the Court has appellate jurisdiction to review the denial of post-judgment relief—the refusal of which is itself a denial of injunctive relief falling squarely within § 2284. Appellees argue jurisdiction is absent because any one member of the three-judge court *could have* acted alone. *See* Mot., 13-14. To the contrary, § 2284 *required* the three-judge panel to act together to grant or deny post-judgment relief. This conclusion is evident from the statutory three-judge court procedure.

Section 2284(b) establishes the procedure for three-judge court proceedings. The statute authorizes a single judge to conduct “all proceedings except the trial” and enter all orders permitted by the rules of civil procedure “except as provided [by the statute].” 28 U.S.C. § 2284(b)(3). On the merits of a claim, the panel *must* act as a whole: “A single judge shall not [...] enter judgment on the merits.” *Id.* In other words, the jurisdictional provision of § 2284(a) is “necessarily interdependent” with § 2284(b)(3) such

that individual judges are prohibited from acting alone when doing so requires a ruling on a question implicating the terms of § 2284(a). *Page v. Bartels*, 248 F.3d 175, 185 (3d Cir. 2001). While this Court has “glossed” § 1253 to disclaim appellate jurisdiction over certain types of orders, this gloss merely “restrict[s] our jurisdiction to orders actually entered by three-judge courts.” *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 97 n.14. (1974). Here, the district court correctly understood Appellants’ motion required a ruling by the full panel because it sought a ruling on Appellants’ equal protection claim—the constitutional trigger for convening a § 2284(a) court. The only logical reading of the statutory scheme vests review of that decision with this Court.

Appellees’ novel, preferred rule turns on a hypothetical inquiry into whether the order *could have* been issued by a single judge. While the Court has dismissed an appeal for want of jurisdiction over a single judge’s order, that decision recognized that § 1253 contemplates an order by the full panel. *Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 2-3 (1971). This conclusion comports with § 2284(b)(3)’s procedure since “[a]ny action of a single judge may be reviewed by the full court at any time before final judgment.” While the courts of appeals are not “powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court[,]” *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 716 (1962), this limited disclaimer is not a general divestment of jurisdiction over any order issued by the panel. To the contrary, it recognizes a litigant’s ability to ask the full panel to review a judge’s order or take appeal in the ordinary course. Appellees’ proposed rule creates the anomalous result of subjecting *some* three-judge orders to appellate review by another three-

judge panel of the court of appeals; a result not contemplated by the statute.

Appellees' theory relies heavily on *Cano v. Baker*, 435 F.3d 1337 (11th Cir. 2006), and *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004). This reliance is misplaced as these cases illustrate Congress's decision to leave appellate jurisdiction over congressional and statewide redistricting cases with this Court. When Congress revised the Judicial Code in 1948, it codified § 2284(a) to require a three-judge court when "required by Act of Congress" or to hear constitutional challenges to congressional and statewide redistricting cases. See Judiciary and Judicial Procedure Act of 1948, 62 Stat. 869. Congress subsequently sought to lessen the burden on this Court by repealing direct appeal statutes and vesting appellate jurisdiction in the courts of appeals. See Eugene Gressman, *Supreme Court Practice*, 90-91 (9th ed. 2007) (explaining direct appeals statutes "largely outlived their original purposes."). Like § 2284(a), these repealed statutes (such as §§ 2281, 2282, and 2325) relied on § 1253. *Id.* at 92.

This legislative history illustrates *Cano* and *McCorvey*'s inapplicability. In *Cano* and *McCorvey*, *Roe v. Wade* plaintiffs moved the district courts for Rule 60(b) relief three decades later. In *Cano*, a single district court judge denied the motion and the Eleventh Circuit affirmed explaining, "even though the underlying judgment was tried by a three-judge court under the former 28 U.S.C. § 2281[,] the repealed statutory regime posed no bar to a single judge ruling on the motion. *Cano*, 435 F.3d at 1341 (emphasis added). In *McCorvey*, the litigant challenged the district court's declination to empanel a three-judge court. The Fifth Circuit concluded, "a

single district court judge, acting alone after the repeal of § 2281, could properly entertain and decide subsequent modified remedial orders.” *McCorvey*, 385 F.3d at 848. These cases are distinguishable because both courts were considering post-judgment procedures *after* Congress stripped the three-judge court of original jurisdiction and vested appellate jurisdiction in the courts of appeals. Congress’s decision not to do the same with § 2284 is strong evidence of congressional intent that this Court continue to review redistricting challenges like this one.

B. This Court construes § 1253 jurisdiction to enable it to decide substantial constitutional questions like this one.

In *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90 (1974), this Court opined that the “very awkwardly drafted” three-judge court statutes have given rise to an area of law where “the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight.” *Id.* at 95. Nevertheless, the unifying principle in this Court’s precedent has been a policy of construing jurisdiction to allow the Court to reach substantial constitutional claims when those claims implicate important state interests.

For example, in *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), a poultry producer sought to enjoin an agriculture commissioner from enforcing state labeling laws on preemption grounds. *Id.* at 112-14. A three-judge court was convened pursuant to repealed § 2281, but the district court, unsure of its jurisdiction, entered judgment as both a single and three-judge court. *Id.* On appeal, this Court rejected the preemption claim as “too insubstantial to support the

jurisdiction of a three-judge court.” *Id.* Notwithstanding this conclusion, the Court found the important jurisdictional questions implicated in *Swift* to require explication since the statute employed such “opaque terms and prolix syntax” that it could be construed to require a three-judge court and direct appeal “in many circumstances where such extraordinary procedures would serve no discernible purpose.” *Gonzalez*, 419 U.S. at 96-97; *see also, Swift*, 382 U.S. at 115-16, 120-22 (same). The *Swift* Court found the workable medium tethered to Congress’s motivation for enacting the three-judge procedure as a way to “alleviate a specific discontent within the federal system” cause by federal decrees enjoining unconstitutional state law. 382 U.S. at 118-19. By requiring a three-judge court, Congress sought to bolster the credibility of federal decrees in “sensitive and politically emotional areas.” *Id.* at 119.

Requiring the collective judgment of three judges and accelerating appeals to this Court were designed to safeguard important state interests. In contrast, a case involving an alleged incompatibility between state and federal statutes, such as the litigation before us, involves more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment.

Id. at 127. By vesting direct appeal with this Court, Congress sought to bring weighty disputes of great public concern to an expedition resolution. *Id.* at 124. Supremacy Clause challenges fell outside this regime because they were not the problem Congress contemplated and were less worrisome since Congress retained power to correct wrongly decided decrees

through subsequent legislation. *Id.* (explaining a constitutional decision is “beyond that ready means of correction”).

In *Gonzalez*, the Court construed § 1253 to exclude appellate review over “issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention[,]” finding these matters of trivial consequence best left to the courts of appeals. *Gonzalez*, 419 U.S. at 99. As explained the following year in *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975), *Gonzalez* explored whether an order “denies” an injunction for the purpose of § 1253 “where there is no adverse resolution of the constitutional claims presented.” *Id.* at 802. This Court explained that while disposition short of the merits may, in the most literal sense, “deny” injunctive relief, appellate review of decisions that failed to reach the constitutional claim did not further the interest advanced by the direct-review procedure. *Id.* at 803-04 (jurisdiction unwarranted because adverse decision turned on abstention not appellant’s constitutional attack); *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 146-48 (1980) (former § 2281 is not implicated by frivolous constitutional claims).

If the Court deems it necessary to construe § 1253 here, it should adopt a construction that facilitates the expeditious resolution of this matter. This appeal raises issues of profound constitutional concern to South Carolina and other formerly covered jurisdictions that also employed racial quotas to draw election districts. *See* J.S. at 4-5 (detailing pending cases). Exercising jurisdiction here comports with this Court’s precedent and ensures a national consensus consistent with equal protection.

CONCLUSION

For these reasons and those set forth in the Jurisdictional Statement, the Court should note probable jurisdiction and either summarily reverse or schedule argument and briefing on the merits.

Respectfully submitted,

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August 27, 2014